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No. 04-712

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LINCOLN PROPERTY COMPANY AND
STATE OF WISCONSIN INVESTMENT BOARD,
Petitioners,

v.

CHRISTOPHE ROCHE AND JUANITA ROCHE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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In any lawsuit, multiple persons or entities – *if* joined as defendants – could become parties whose citizenship would be relevant to whether complete diversity exists. Such putative, unnamed defendants might include affiliates of a named corporation or partnership; entities the named defendant contracted with, directed, or authorized to perform the acts at issue; and others that might, for myriad reasons, face potential joint and several liability. The lower court's *sua sponte* ruling impermissibly turned that commonplace truth into an unprecedented legal rule of indeterminate scope, requiring dismissal when one putative, unnamed defendant is potentially non-diverse. The court also departed from established law by basing a partnership's citizenship on its "nexus" with the plaintiff's state.

Both holdings create unworkable rules and should be reversed. As masters of their complaint, respondents should be held to their strategic choices. While respondents now accuse Lincoln of hiding the existence of its affiliates, their own pleadings indisputably show that they made tactical decisions about which Lincoln entity they wanted to sue. In their original, amended, and second amended complaints, they themselves noted Lincoln's use of affiliates – and they even went so far in their second amended complaint as to drop any mention of Lincoln Property Company ECW, Inc. – the entity they now claim is crucial and diversity-destroying. Respondents never sought to join any Lincoln affiliate as a defendant, and they did not even pursue discovery geared toward learning more about those affiliates. Those strategic decisions cannot now be the reason for destroying diversity based on putative, unnamed defendants that respondents chose not to sue.

The court's second holding on the "nexus" of a partnership is ungrounded in any decision of this Court and should be rejected. Respondents make no effort to defend the Fourth Circuit's rule on its merits, and their efforts to argue that the court below did not concoct a new rule cannot be squared with the court's opinion and holding.

I. THE CITIZENSHIP OF A LINCOLN AFFILIATE THAT PLAINTIFFS DID NOT SUE IS IRRELEVANT TO DIVERSITY JURISDICTION

A. The Text Of 28 U.S.C. §§ 1332 And 1441 Confirms That Removal Was Proper Here

1. The texts of the statutes governing original diversity jurisdiction, § 1332, and removal of a diversity action to federal court, § 1441, preclude searching outside the complaint for jurisdictional spoilers that plaintiffs failed to join as defendants to their civil action. *See* Pet. Br. 14-15.

Section 1332(a)(1) provides for original jurisdiction of all "civil actions" that are "between . . . citizens of different states." By long understanding, a "civil action" is a "proceeding in a court of justice in which one party, known as the 'plaintiff,' demands against another party, known as the 'defendant,' the enforcement or protection of a private right." *Black's Law Dictionary* 332 (3d ed. 1933) ("A 'civil action' implies adversary parties and an issue.").[1] The Federal Rules of Civil Procedure codify that understanding by setting forth in Rule 3 that a "civil action is commenced by filing a complaint with the court," and in Rule 4(a) that the "summons" shall "identify the court and the parties [and] be directed to the defendant." The only parties defendant so named in the complaint and the

[1] *See also Black's Law Dictionary* at 41 (defining "action" as "[t]he legal and formal demand of one's right from another person or party made and insisted upon in a court of justice"); *Bouvier's Law Dictionary* 41 (1928 & 1946) ("The vital idea of an action is a proceeding on the part of one person as actor against another."). Until 1948, the diversity statute referred to "suits of a civil nature." Judiciary Act of Sept. 24, 1789, § 11, 1 Stat. 78. The word "suit" as used in the 1789 Judiciary Act means "a right [that] is litigated *between parties* in a court of justice." *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449, 464 (1829) (Marshall, C.J.) (emphasis added); *cf. Hardy v. Johnson*, 68 U.S. (1 Wall.) 371, 374 (1863) ("The names of the real claimants and defendants must appear in the pleadings."). In 1948, the "[w]ords 'all civil actions' were substituted for 'all suits of a civil nature, at common law or in equity' in order to conform to Rule 2 of the Federal Rules of Civil Procedure." 28 U.S.C. § 1332, 1948 Revision Note.

summons here – and therefore the parties that constitute defendants' side of this "civil action" – are Lincoln and SWIB. *See* Pet. Br. 14-15. Plainly, a person *not* named as a defendant cannot be one of the citizens "between" whom a civil action exists under § 1332(a)(1).

Section 1441(a) then provides for removal of any "civil action" in which the courts have original jurisdiction, and § 1441(b) echoes the § 1332 diversity requirement that a suit be between citizens of different states by permitting removal only by "parties in interest properly joined and served." Thus, neither § 1332 nor § 1441 permits plaintiffs to challenge diversity based on the citizenship of entities they failed to name as defendants in the "civil action" they initiated. And § 1441(b) makes clear that removal can be effectuated only by "parties in interest properly joined and served as defendants."

2. Respondents take issue with that textual reading through a series of unpersuasive deflections.

a. Respondents point (Br. 21) to exceptions provided by Congress to the foregoing general rule. Section 1332(c)(1) treats the citizenship of an insurer in certain cases to be the same as its unnamed insured, and § 1332(c)(2) deems the citizenship of the representative of a decedent's estate, an infant, or an incompetent to be the same as the unnamed, represented person. While not explicit, respondents appear to suggest that lower courts can make up additional rules in other contexts attributing to a named party the citizenship of an unnamed person interested in the lawsuit. That suggestion is untenable.

Respondents ignore that § 1332(c)(1) is not silent on the rule for determining a corporation's citizenship. It provides that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." *See* Pet. Br. 15. Respondents thus seek judicial amendment of that language to add the phrase, "and of the state of any unnamed corporate affiliate with some interest in the civil action." But this Court has long disfavored such statutory

rewriting because "[t]o do so would be to legislate, and not to interpret and give effect to the statute as passed by congress." *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 43 (1895) ("We have no authority to add to the [statute] the words, 'prior to his application.'"). This Court has specifically applied that restraint to § 1332(c) and "left further adjustments to be made by Congress." *Carden v. Arkoma Assocs.*, 494 U.S. 185, 196 (1990). "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (internal quotation marks omitted). Thus, this Court should reject respondents' and the Fourth Circuit's suggestion to expand the express exceptions contained in § 1332(c)(1).

b. Respondents also mistakenly assert (Br. 20) that "[§] 1441(b) is irrelevant" and that petitioners' reading "expand[s] the scope of diversity jurisdiction" provided for in § 1332(a)(1). For the foregoing reasons, § 1332 cannot bend to respondents' needs. But even if it could, § 1441(b) is not only relevant, but controlling. While respondents are correct that § 1441(a) incorporates the original jurisdiction standard of § 1332, § 1441(b) plays a vital function in confirming that, just as under § 1332(a)(1), the only citizenship relevant to the diversity analysis is that of the "parties in interest properly joined and served." Respondents do not dispute that that phrase is best understood to incorporate this Court's holdings – rendered under § 1332 or its predecessors – that formal, nominal, or fraudulently joined parties are not to be considered in the diversity analysis. *See* Pet. Br. 24-25. Likewise, none of this Court's cases under §§ 1332 or 1441 can be read to require a court to attribute the citizenship of an unnamed, putative defendant to that of the named defendants, or to require those unnamed defendants to be joined. *See* Pet. Br. 17-28. To the contrary: § 1441(b)'s reference to "parties in interest properly joined and served" confirms that plaintiffs are not required to "join[] and serve[]" all potential "parties in interest" to their "civil action."

B. This Court's Cases Support Removal Here

As even respondents acknowledge (Br. 20), this Court's cases look only to the citizenship of the named parties.[2] Other doctrines further support removal here.

1. As masters of their complaint, plaintiffs' choice of whom to sue is respected even when they sue only diverse parties. *See* Pet. Br. 17-21. That principle supports removal here because it confirms that, aside from Rule 19 indispensable parties, courts are not empowered to add defendants that plaintiffs have declined to sue. Thus, in *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48 (1954), an automobile accident victim sued the other driver's diverse insurance company but not the non-diverse driver. This Court considered the citizenship only of the *named* defendant to find diversity. Pet. Br. 17-18.

Respondents concede (Br. 32) that *Lumbermen's* upheld the plaintiff's "strategic choice" to sue only the insurer, even though naming the insured would have destroyed diversity. They claim *Lumbermen's* does not apply because Lincoln "deliberately obscured" "the existence or identity of any potential defendant." *Id.*; *see also id.* at 34. Respondents cite nothing in *Lumbermen's* for that proposition. In any case, Lincoln obscured nothing, and respondents' own pleadings and conduct plainly show that they knew at the very outset of this case that Lincoln operated through agents and affiliates. *See infra* pp. 11-19. They simply ignored those affiliates until they lost on the merits.

This Court's cases analogously hold that the master-of-the-complaint rule permits a state-court plaintiff to decide

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[2] *See Carden*, 494 U.S. at 188 n.1 ("The question . . . which of the various parties *before the Court* should be considered for purposes of determining whether there is complete diversity of citizenship . . . will generally be answered by application of the 'real party to the controversy' test.") (emphasis added); *Rice v. Houston*, 80 U.S. (13 Wall.) 66, 67 (1871) ("it is the character of the real and not that of the nominal parties *to the record* which determines the question of jurisdiction") (emphasis added).

whether to allege federal claims and risk having the case removed, or to forgo them and keep the case in state court. *See* Pet. Br. 18-19. Respondents merely note that those cases concerned federal-question jurisdiction, without disputing that, if a plaintiff's similar tactical choices with respect to federal-question jurisdiction must be respected by a federal court, then there is no reason why similar choices should not be treated as dispositive for diversity jurisdiction. *See* Resp. Br. 32 n.9.

Respondents also have no response (*see id.*) to *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968). There, the Court vacated a lower-court dismissal for the plaintiff's failure to name a supposedly indispensable, non-diverse party, and opined that "clearly the plaintiff, who himself chose . . . the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them." *Id.* at 111; *see* Pet. Br. 19. Except for the decision below, the lower courts have adhered to the principle that "a plaintiff is ordinarily free to decide who shall be parties to his lawsuit." *Simpson v. Providence Washington Ins. Group*, 608 F.2d 1171, 1174 (9th Cir. 1979) (Kennedy, J.). *See also* Pet. Br. 20.[3]

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[3] In *Simpson*, an Alaska citizen sued a Rhode Island parent corporation, but not its Alaska subsidiary, in a state-law employment dispute. *See* 608 F.2d at 1173. The plaintiff, however, was "held out to federal and state authorities as Subsidiary's employee," and the subsidiary had reimbursed the parent for "the full amount of [the plaintiff's wages]." *Id.* Despite the subsidiary's substantial interest, the court found diversity to exist based solely on the citizenship of the named parent corporation defendant. *See id.* at 1174-75. Important here, the court held that, "if under state law Simpson possessed no cause of action against the Rhode Island parent corporation because the parent was not Simpson's employer, the defendant was entitled to object by pleading or motion under Fed. R. Civ. P. 12." *Id.* at 1174. It did *not* hold that a court must reform the plaintiff's complaint to join a non-diverse affiliate after plaintiff loses on the merits. Respondents ignore *Simpson*'s core master-of-the-complaint holding and instead suggest the defendant sought dismissal for the plaintiff's failure to name the subsidiary *after* the defendant's preemption defense was rejected. *See* Resp. Br. 33 n.9. In fact, the parties jointly raised the potential jurisdictional issue "just prior to oral argument" on the preemption motion, not after it was decided. *Simpson*, 608 F.2d at 1173. *See also Simpson v. Providence Washington Ins. Group*, 423 F. Supp. 552, 553 n.1 (D. Ala. 1976), *aff'd*, 608 F.2d 1171 (9th Cir. 1979).

2. This Court's cases also permit plaintiffs voluntarily to dismiss non-diverse defendants to create diversity that was lacking at the outset of the case. *See Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989). In view of those decisions, the Fourth Circuit's holding plainly makes no sense, because it ignores the litigation choices respondents actually made and substitutes in their stead a trap for successful defendants who must be ever-wary of plaintiffs' invocation of non-diverse, putative defendants. While the lower court's decision focused mainly on affiliates of Lincoln, the rule it fabricated has no logical stopping point and requires possible consideration of the jurisdictional consequences of all persons or entities under contract with the defendant or involved in some other way with the plaintiffs' allegations against the named defendant(s). *See* Pet. Br. 22-23 (discussing Fourth Circuit's suggestion that citizenship of mold remediation company hired by petitioners' agent is relevant to diversity).

Respondents seek to distinguish *Caterpillar* because it "concerned a technical removal flaw; the jurisdictional spoiler had been removed by the time of trial and judgment. In the instant case, the Fourth Circuit held that no jurisdiction ever vested in the federal courts because defendants failed to carry their burden of proving diversity." Resp. Br. 33-34. In *Caterpillar*, however, diversity did not exist at the time of removal, but the plaintiff cured that defect by later dismissing the non-diverse defendant. The Fourth Circuit's rule turns *Caterpillar* on its head by nullifying the jurisdictional consequences of a plaintiff's choice at the outset – declining to sue a non-diverse defendant – when this Court held that a plaintiff may permissibly dismiss a non-diverse defendant later in the case.

Caterpillar further found that, "[o]nce a diversity case has been tried in federal court, . . . considerations of finality, efficiency, and economy become overwhelming." 519 U.S. at 75. These concerns are no less present here, where summary judgment was awarded to petitioners after the parties had conducted considerable discovery.[4]

Respondents concede that *Newman-Green* held that "the Courts of Appeals, like District Courts, have the authority to dismiss a dispensable, nondiverse party to eliminate a jurisdictional defect." Resp. Br. 34. They attempt to distinguish that case, however, by pointing to the Court's observation that, if the case before it were dismissed for lack of diversity, then the plaintiff would simply re-file it in federal court and "proceed to a preordained judgment." *Newman-Green*, 490 U.S. at 827. The Court concluded there only that it made no sense, "merely for the sake of hypertechnical jurisdictional purity," to deny the court of appeals the same power held by the district court to dismiss a non-diverse, *named* defendant once the jurisdictional defect was discovered. *Id.* The Court never suggested that an *unnamed*, putative defendant's existence compels dismissal or remand.

C. Respondents' Other Arguments Fail

Respondents claim that "this Court has consistently applied (1) the 'real party to the controversy' test to both plaintiffs and defendants, and (2) rejected any suggestion that the courts are constrained in their review by the

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[4] Respondents' reliance (Br. 34) on *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567 (2004), is likewise inapt. That case distinguished *Caterpillar* in the context of applying a very different time-of-filing rule prohibiting a non-diverse party from changing *its own* citizenship after the case was filed to create diversity. *See id. at* 574 ("'[W]here there is *no* change of party, a jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit.'") (quoting *Conolly v. Taylor*, 27 U.S. (2 Pet.) 556, 556 (1829) (Marshall, C.J.)); *id.* at 571 ("We have adhered to the time-of-filing rule regardless of the costs it imposes."). The time-of-filing rule has no relevance here, because neither side has attempted to alter the citizenship of any named party to the complaint.

identity of the parties enumerated in the complaint." Resp. Br. 21. None of the cases they identify supports their position that diversity is based on unnamed, putative defendants that have an interest in the lawsuit.

1. Respondents primarily rely (Br. 21) on a line of inapposite cases applying the real-party-in-interest analysis to plaintiff representatives of non-party beneficiaries. Because a trustee has the power to hold and to manage the assets of others, the trustee is a real party to the controversy empowered by statute or rule to sue in his or her own name.[5] None of those cases suggests that the existence of unnamed, putative *defendants* destroys diversity. Indeed, in one case highlighted by respondents, this Court held that a corporation is a citizen in its own right and is a citizen of its state of incorporation. *See Marshall v. Baltimore & Ohio R.R.*, 57 U.S. (16 How.) 314, 328-29 (1853). Nothing in that case suggests that a court may look to *unnamed* affiliates of the named corporate defendant in determining diversity jurisdiction. As explained above, § 1332 does not authorize such an inquiry.

In *McNutt v. Bland*, 43 U.S. (2 How.) 9 (1844), the Court simply applied the rule that a *named* party who is merely nominal is irrelevant to the diversity analysis. *See id.* at 14-15 (citizenship of non-diverse state governor having no interest in suit disregarded as nominal where statute required diverse private plaintiff to sue in governor's name). In that nominal-party line of cases, the Court looks only at the *named* defendants to determine whether

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[5] Thus, the "trustees of an express trust are entitled to bring diversity actions in their own names and upon the basis of their own citizenship." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 462 (1980); *see* Pet. Br. 27-28 (discussing *Navarro*); *Rice*, 80 U.S. (13 Wall.) at 66 (same); *Coal Co. v. Blatchford*, 78 U.S. (11 Wall.) 172, 177 (1870) (same); *see also* Fed. R. Civ. P. 17(a). Respondents incorrectly assert (Br. 22) that the court of appeals did not rely on Rule 17(a), which they concede applies only to plaintiffs. *See* Pet. Br. 25-26. The court expressly held, however, that "joinder of the 'real party in interest' would be required under Rule 17(a)." Pet. App. 17a n.17; *see* Pet. Br. 24.

their citizenship may be disregarded in the diversity analysis. But the Court does *not* examine the citizenship of putative, unnamed defendants. *See* Pet. Br. 24-25.

2. Respondents next rely (Br. 23-24) on the doctrine that a suit against a state's alter ego is in fact against the state itself. A state may not be sued in diversity because it is not a "citizen" for purposes of § 1332(a)(1). In *State Highway Commission of Wyoming v. Utah Construction Co.*, 278 U.S. 194, 199 (1929), this Court dismissed such a case where "[t]he state acting through the highway commission, as it might through any officer, became a party to the original agreement and obligated herself thereby. . . . The commission was but the arm or alter ego of the state, with no funds or ability to respond in damages."

That line of cases is inapposite here because there is no suggestion that Lincoln is the alter ego of a state. It is necessary to treat a suit against a state's alter ego as one against the state "to afford the States the dignity and respect due sovereign entities" and thereby to preserve a state's Eleventh Amendment right not to be haled into federal court. *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 769 (2002). Those special concerns have no applicability to a private lawsuit. In any case, Lincoln is not alleged to be the "alter ego" of any of its affiliates, but it is a real party in interest in its own right. *See* Pet. Br. 5-6, 15-17; *infra* pp. 12-14.

3. Finally, respondents claim (Br. 24) that "the inquiry made by the Fourth Circuit is consistent with this Court's disapproval of the manipulation of corporate affiliates to manufacture diversity" under 28 U.S.C. § 1359. Section 1359, however, applies only to parties "improperly or collusively *made or joined* to invoke the jurisdiction of the court" (emphasis added). What respondents complain about here is their decision *not* to join a putative, nondiverse defendant. As we explain (Pet. Br. 20 n.16), and as respondents do not dispute, § 1359 does not proscribe nonjoinder (even if the nonjoinder is collusive, which is not the case here). *See Western Maryland Ry. v. Harbor*

Ins. Co., 910 F.2d 960, 964 (D.C. Cir. 1990) (Thomas, J.); *Simpson*, 608 F.2d at 1174-75 (Kennedy, J.).[6]

D. Respondents' Accusations Of Deception By Lincoln Are Baseless

As masters of their complaint, respondents chose the theory of their case and the defendants they sued. Only after losing on the merits did they begin casting about for jurisdictional spoilers. To mask that dispositive fact, they open a fire hose of invective, claiming Lincoln "deliberately obscured" the existence of its affiliates. Br. 32. Respondents thus relentlessly (but groundlessly) blame Lincoln for the case they themselves chose to bring, and for not answering discovery-type questions respondents never propounded and pose for the first time in this Court.

Respondents' original complaints alleged that "Lincoln is one of the largest and most diversified real estate firms in the United States," Lincoln's headquarters were in Texas, "Lincoln trades under various and sundry names throughout the United States," and respondents would, "[u]pon further discovery," "determine if additional defendant or defendants will be named." JA 27-28, 53-54. Two months later, they proposed an amended complaint colorfully alleging that Lincoln had an "'Enronesque' system" with "layers of subsidiaries and/or other controlled entities." Proposed Amended Complaint ¶ 7(d) (Oct. 25, 2002) (Dist. Ct. Dkt. Entry 21).[7] Two more months later, they

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[6] Even farther afield is respondents' reliance (Br. 26) on the principle that "this Court realigns parties according to their interests in the dispute, regardless of how the plaintiff labels them." There is no claim here that a defendant should be realigned as a plaintiff, or vice-versa.

[7] *See also* Proposed Amended Complaint ¶ 7(e) (Oct. 25, 2002) (Dist. Ct. Dkt. Entry 21) ("under the legal principles of agency, both the principal and the agent can be held accountable"); *id.* ¶ 50(k) ("All the above malfeasance and misfeasance acts of defendant, Lincoln, were done through its agents, 'SWIB' and INVESCO, or by Lincoln itself, as further discovery should reveal."); *id.* ¶ 58(c) ("Defendant, INVESCO, upon information and belief, will be shown to be one of the subsidiaries and/or wholly-owned subsidiary, and/or controlled agent of the [*sic*]

filed a second amended complaint that dropped any mention of Lincoln Property Company ECW, Inc. – a Lincoln affiliate that respondents had mentioned only in the captions of their original complaints. JA 114. And each of respondents' complaints based Lincoln's alleged liability on an agency theory. *See* Pet. Br. 6, 16-17. Given the way they have litigated this case, what respondents seek is to be freed of any burden either to do any research on a defendant's organizational structure before filing their complaint or to conduct any needed discovery afterward.

1. Lincoln Is Clearly an Interested Rather Than a "Nominal" Defendant

Respondents assert "that Lincoln was in effect a nominal party – that, because Lincoln was not authorized to do business in Virginia (*see* JA 234-35[8]), there must have been other 'Lincoln' entities operating out of Lincoln's Herndon, Virginia, offices and managing Westfield." Resp. Br. 9. Respondents never explain what they mean by "nominal." They appear to suggest that, because Lincoln managed Westfield Village Apartments in Virginia through an affiliate (EQR) rather than directly, respondents are entitled to seek out affiliates to destroy diversity that they have never sought to add as defendants.

a. Lincoln's presence in the case is not "nominal." Respondents did not sue Lincoln because it performed a merely ministerial act. Under the theory of plaintiffs' complaints, Lincoln (which was listed as SWIB's agent in the lease) faced a real potential liability either (1) for its own acts, (2) as the agent of SWIB, (3) as a joint tortfeasor with SWIB or another Lincoln affiliate, or (4) for the acts of its own agents. *See* Pet. Br. 3-4, 16-17. Moreover,

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Lincoln and/or SWIB and is an entity that was set up to evade the responsibility and accountability for the actions of Lincoln Property.").

[8] Virginia law provides that "the failure of a foreign corporation to obtain a certificate of authority shall not impair the validity of its corporate acts or prevent it from defending any proceeding in this Commonwealth." Va. Code Ann. § 13.1-920 (2005).

plaintiffs also sued SWIB, the *owner* of Westfield Village, on a similar theory of responsibility for the acts both of SWIB itself and of SWIB's agents (including Lincoln). Thus, even if Lincoln were deemed a "nominal" party (and thereby subject to dismissal), respondents still could have chosen to allege its claims against SWIB. Respondents, however, never acknowledge that plain fact.[9]

b. Moreover, even if Lincoln were a "nominal" defendant inasmuch as it could not be held liable on the merits of respondents' claims, that would not be grounds for the

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[9] Respondents assert "that Lincoln did not carry its burden of proof that it was a foreign corporation." Resp. Br. 28. That is incorrect. Respondents' own complaints allege that "Lincoln Property Company is a corporation with corporate headquarters located at 500 North Akard Street, Suite 3300, Dallas, Texas." JA 27, 53. Likewise, neither respondents nor the court below questioned that Lincoln's principal place of business is in Texas, *see* JA 77, 81, and the court expressly held that "the nominal party and ultimate parent company, Lincoln Property Company, is a Texas citizen," Pet. App. 16a. The record also contains official documents from the State of Texas confirming that Lincoln is a Texas corporation, *see* JA 241-46, and the authenticity of those documents has never been questioned. The deposition testimony misconstrued by respondents (Br. 6-7) in suggesting that Lincoln was instead a partnership cannot be used to impugn those official state public records. *See, e.g., Acord v. Western Pocahontas Corp.*, 156 F. 989, 1000 (C.C.S.D. W. Va. 1907) (giving "judicial notice" to "the public records of this state" showing dissolution of a corporation), *aff'd*, 174 F. 1019 (4th Cir. 1909); *Grassmueck v. Barnett*, 281 F. Supp. 2d 1227, 1232 (W.D. Wash. 2003) (giving "judicial notice" to articles of incorporation as "certified public records kept by the Secretaries of State in Washington and Delaware"). No Texas statute provides that a corporation can also be a partnership. *See Merrill v. Town of Monticello*, 138 U.S. 673, 684 (1891) (rejecting allegation concerning powers of a corporation as "inconsistent with the public laws of the state, of which the courts of the United States take judicial notice"). In any case, none of respondents' scattershot deposition questions attempted to probe the relationship between Lincoln and Lincoln affiliates that were not sued. It thus seems obvious from the deposition excerpt cited by respondents (Br. 6) that the reference to "Lincoln" meant something different to the examining attorney and the deponent, and counsel never sought clarification of that ambiguity. *See also, e.g.*, JA 176 ("We're in partnerships. Various Lincoln partnerships are in ownership – various Lincoln partners are partners in partnerships that own assets.").

Court to cast about for new defendants. It would simply mean that Lincoln would be dismissed. *See Simpson*, 608 F.2d at 1174. We are aware of no case – and respondents have cited none – in which this Court authorized substitution of a putative, unnamed defendant once a plaintiff lost on the merits against the named defendant.

To the contrary, this Court's cases labeling defendants as "nominal" in the diversity context concern *named*, non-diverse parties whose citizenship may nevertheless be disregarded because they did not have a substantive stake in the case. Thus, for example, the presence of a non-diverse trustee sued only to perform the ministerial act of transferring property to the prevailing party does not destroy diversity. *See* Pet. Br. 25 & n.21. This nominal-party doctrine serves to *prevent* plaintiffs from *defeating* a defendant's "right of removal . . . by a fraudulent joinder of a resident defendant having no real connection with the controversy." *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921). Respondents have no basis for suggesting that this rule permits them to defeat removal after losing on the merits by identifying a putative defendant they never sued.

2. The Citizenship of ECW I Is Irrelevant

From their original complaints, respondents acknowledged that Lincoln operated or might operate through various affiliated entities and that discovery would be needed if respondents wanted to make those affiliate relationships an issue in the suit. *See supra* pp. 11-12.

Indeed, respondents listed one of those affiliates in the caption of their original complaints, which named Lincoln and then added the phrase "t/a Lincoln Property Company ECW, Inc., Agent." JA 26, 52.[10] Respondents presumably mentioned ECW I because it was the Lincoln entity that

[10] Respondents refer to this t/a entity as "ECW I." For the Court's convenience, so will petitioners.

issued Mr. Roche's paycheck.[11] Nevertheless, ECW I was not a party defendant because respondents made no mention of ECW I in the body of their original complaints.[12]

Moreover, long before this case reached the Fourth Circuit, respondents *voluntarily dropped* from the second amended complaint's caption any mention of ECW I. *See* JA 114. Respondents also failed to mention ECW I in the body of that complaint, which they now concede (Br. 38) is the only relevant complaint here. *See* Pet. Br. 31 & n.25. Respondents presumably dropped ECW I because they (1) declined in the amendment to re-allege Mr. Roche's employment claim and (2) chose to allege their amended breach of lease claim against only SWIB (a claim they subsequently dismissed voluntarily in the district court). *See* Pet. Br. 6; JA 182.[13] Nor did respondents issue a single discovery request or ask a single deposition question about ECW I. Their own pleadings thus confirm that respondents made a strategic choice to prosecute their case only against Lincoln and SWIB. Indeed, even in its mis-

[11] ECW I also executed the lease as agent for SWIB, *see* JA 94, but respondents claimed that they no longer had a copy of the lease when they filed their original complaints, *see* JA 28-29, 54-55.

[12] *See, e.g., Jeffries v. Jeffries' Ex'r*, 96 S.E. 197, 198 (Va. 1918) ("The bill must contain averments showing some cause for relief against him, else he is no party to the litigation."); *Collins v. Kibort*, 143 F.3d 331, 334-35 (7th Cir. 1998) ("The caption is plainly incorrect. A plaintiff cannot state a claim against a defendant by including the defendant's name in the caption."); *see also* Pet. Br. 33 n.27. In any case, respondents admit that they sued only one "entity," Resp. Br. 4, *i.e.*, Lincoln.

[13] Respondents dismissed their breach of lease claim shortly after Mr. Roche invoked his Fifth Amendment privilege 40 times at a deposition in response to questions about apparently falsified income documents, including an IRS Form 1099, submitted by respondents in connection with their apartment lease application. *See* Defendants' Motion to Compel Discovery and for Sanctions at 4 (Jan. 29, 2003) (Dist. Ct. Dkt. Entry 34); Order (Feb. 7, 2003) (Dist. Ct. Dkt. Entry 51) ("Defendants' motion to overrule assertions of Fifth Amendment privilege and to further depose Plaintiffs is GRANTED."); Motion to Voluntary [*sic*] Dismiss Count II (Feb. 13, 2003) (Dist. Ct. Dkt. Entry 59); JA 182.

taken view of Lincoln's affiliates, the Fourth Circuit did not view ECW I as a relevant entity for diversity jurisdiction; its single mention of ECW I is in its recitation of the captions of the original complaints. *See* Pet. App. 2a.[14]

It is remarkable in the face of respondents' own demonstrated lack of interest in suing ECW I that they now chide Lincoln for having "remained silent as to the corporate citizenship of one key affiliate – the corporate entity that signed the Roches' lease," Resp. Br. 4, *i.e.*, ECW I. Petitioners did no wrong in "remaining silent" about an entity that respondents chose not to sue and about which they asked no questions in discovery.[15]

Respondents' attempt for the first time in this Court to make a jurisdictional issue out of ECW I confirms that application of the Fourth Circuit's novel jurisdictional rule would usher in an era of re-litigation catastrophes in district courts across the country. *See* Pet. Br. 15-16, 19, 22-24, 36-38. Respondents' new focus on an entity that they chose not to sue amply demonstrates the lengths to which plaintiffs will go to have a loss on the merits vacated and the case remanded to state court for a fresh start. Adoption of the court of appeals' wayward rule would require the district courts to entertain – indeed, they would have an ongoing and *sua sponte* duty to stage – such three-ring jurisdictional circuses. For businesses (such as in the real estate industry) that have sound reasons to conduct their commerce using multiple entities, the jurisdictional mischief created by the lower court's rule would be endless.[16]

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[14] Respondents thus falsely assert (Br. 4) that the court held that Lincoln's "silen[ce]" as to ECW I was "designed to shroud the identity of real parties to the controversy." The court held no such thing.

[15] In any case, ECW I is a Texas corporation, as confirmed by that state's corporate records. *See* Westlaw Database Corp-TX (search for Reg. No. 0070542500). Had ECW I been made a party, Lincoln would also have shown that its principal place of business is in Texas.

[16] *See* Real Estate Roundtable *et al.* Amicus Br. 6-13. At various points, respondents seek artificially to limit the lower court's holding to "non-public entities" "which are not candid as to their role, and that of their affiliates, in the transaction or occurrence at issue." Resp. Br. 37. That is plainly incorrect. The Fourth Circuit itself never limited its holding to non-public entities. Public business associations can also operate through complex structures for a variety of legitimate reasons.

3. The Citizenship of EQR and Any Other Lincoln Affiliate Is Irrelevant

The court of appeals appeared to hold that EQR, the entity that collected the management fees for Westfield Village, was an indispensable party without whose presence the case could not proceed. *See* Pet. App. 11a-13a, 16a. Accordingly, the court's decision functionally abrogated Rule 19. *See* Pet. Br. 28-36.

a. Respondents do not dispute that EQR was not an indispensable party. Instead, they claim that "the Court of Appeals was explicit that it was unable to identify the real parties to the controversy." Resp. Br. 35. But the court discussed the evidence of EQR's citizenship at length, *see* Pet. App. 12a-13a, which would have been unnecessary had the court thought EQR's citizenship was irrelevant.[17] Thus, whether one views the court to have functionally held that only EQR was indispensable, or that EQR plus some indeterminate number of other Lincoln affiliates were indispensable, the result is the same. Under the guise of its flawed real-party-in-interest analysis, the court of appeals plainly held that those affiliates must be made parties. *See id.* at 16a ("to be accurate, both the Texas parent and the Virginia sub-'partnership' *should be parties* to the instant action") (emphasis added). Requiring unnamed defendants to be joined, however, is the province of Rule 19 – not the diversity or removal statutes. And respondents concede that Rule 19 "suppl[ies] standards" where a court "is in fact able to identify" "an unnamed, non-diverse, real party to the controversy." Resp. Br. 38.

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[17] As petitioners point out – and as respondents do not in any way contest – the court of appeals' analysis of EQR's citizenship was both wrong and internally inconsistent. *See* Pet. Br. 45-47 & n.37.

Respondents also claim (Br. 5) that Lincoln committed deception by admitting the second amended complaint's allegation that Westfield Village "is managed and was at all relevant times managed by the Lincoln Property Company through its regional offices located at 1155 Herndon Parkway, Suite 100, Virginia." JA 115; *see* JA 137. Respondents now assert (Br. 5) – for the first time in this litigation – that Lincoln should have answered "that its 'regional offices' were in fact separate, affiliated entities." But the management personnel in those regional offices, such as the Texas-based EQR that employed them, were Lincoln's agents. It was thus certainly correct for Lincoln to admit that it managed Westfield Village through the agents in its "regional offices." Indeed, the allegation itself appears rooted in the agency theory that pervades each of respondents' various complaints.[18]

b. In any case, Lincoln filed the answer about which respondents complain on January 6, 2003.[19] Respondents concede (Br. 7-8) that, just nine weeks later, on March 13, 2003, Lincoln voluntarily disclosed that its affiliate, EQR, collected the management fees for Westfield Village in a letter responding to respondents' request for proof that Lincoln could satisfy a judgment in the event it lost at trial. *See* JA 236. Nothing about that response was dilatory or deceptive, yet respondents nonetheless never sought discovery about EQR or attempted to join EQR as a defendant.

Tellingly, respondents avoid answering the obvious question: Why, after learning that EQR collected the management fees for Westfield Village, did they not move

[18] Equally without merit is respondents' claim (Br. 5) of deception in Lincoln's answer that "Lincoln advertised in newspapers and in realtor brochures that it was the owner and property manager of Westfield Village Apartments." JA 115. Respondents identify no rule requiring disclosure of affiliates or agents in a company's public advertising.

[19] Petitioners were never required to answer the original complaints, which were filed in August 2002, because petitioners had moved to dismiss them. *See* Fed R. Civ. P. 12(a)(4)(A).

to join EQR as a defendant? The obvious answer is that they simply chose to focus their suit on SWIB and Lincoln. That is perfectly consistent both with their strategy of declining to sue ECW I and with their agency theories of liability, pursuant to which Lincoln could be liable if respondents could prove their claims.

Finally, respondents complain that, "[a]lthough EQR was identified as the recipient of the management fees for Westfield, there was no disclosure as to which Lincoln entity (or entities) performed management services at Westfield." Resp. Br. 8. Respondents, however, never asked for information about which of Lincoln's agents or affiliates was responsible for managing Westfield Village.[20] In their view, a plaintiff may fail to take discovery geared to identify additional defendants, lose on the merits, and then have the case dismissed for lack of complete diversity because the defendants did not volunteer information about putative, unnamed defendants about which the plaintiffs never bothered to ask.[21]

[20] Respondents concede that, in response to the Fourth Circuit's unanticipated new rule, Lincoln established on remand that, apart from EQR, "'[n]o other entity . . . was involved in the management of Westfield Village or . . . received fees or revenue of any kind for the management of it.'" Resp. Br. 13. *See* Addendum, *infra*, 3a (Declaration of Dan M. Jacks (Aug. 5, 2004) (Dist. Ct. Dkt. Entry 186)); *cf.* Resp. Br. 12 n.3.

[21] This Court should express disfavor with the *sua sponte* nature of the court of appeals' decision. *See* Pet. Br. 38-41. Although respondents note (Br. 41) that jurisdictional issues were briefed in the district court, they do not dispute that the novel issue created and decided by the Fourth Circuit was never briefed or argued. *See* Pet. Br. 38 & n.32. And, because the court of appeals decided the jurisdictional issues in a *sua sponte* manner, the *sua sponte* point is "fairly included" within both questions presented. Sup. Ct. Rule 14.1(a); *cf. Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Finally, while respondents note (Br. 41-42) that petitioners moved for rehearing, they do not dispute that a summary denial of a rehearing petition is not a decision on the merits of the arguments raised in the petition, and thus does not provide the opportunity to be heard required by the Fifth Amendment. *See* Pet. Br. 39 n.33.

II. THE FOURTH CIRCUIT'S "VERY CLOSE NEXUS" TEST IS CONTRARY TO LAW

The citizenship of a limited partnership is determined by the citizenship of each of its partners. *See Carden*, 494 U.S. at 195. Both this Court and Congress have declined to make the principal-place-of-business test applicable to such unincorporated associations. *See* Pet. Br. 41-44. Accordingly, this Court should also reverse the Fourth Circuit's novel holding that a limited partnership with "a very close nexus with the Commonwealth" of Virginia is a citizen of that state for diversity purposes. Pet. App. 16a.

Respondents do not dispute that the nexus test is unlawful. Instead, they claim the court did not apply it, yet they admit (Br. 40) that it held "that the existence of this nexus was further evidence of Lincoln's obfuscation." Plainly, the court applied its nexus test to EQR. After reviewing evidence of a Virginia nexus, it held that "[a]ll of this militates in favor of finding that the real and substantial party in interest is the Lincoln entity (partnership or not); probably Lincoln/EQR Limited Partnership." Pet. App. 15a; *accord* Resp. Br. 40 ("the Court subsumed all those indicia under a comment on 'a very close nexus with the Commonwealth'"). Given that the court relied on its nexus test to find complete diversity lacking, respondents cannot fairly claim that the nexus question "is not fairly raised in the Fourth Circuit's opinion." *Id.* at 41.[22]

CONCLUSION

The judgment of the court of appeals should be reversed.

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[22] While the citizenship of EQR should be irrelevant because EQR was never named as a defendant, it is clear – and respondents nowhere dispute – that EQR is *not* a Virginia citizen because none of its general or limited partners is a citizen of Virginia. *See* Pet. Br. 45-47.

Respectfully submitted.

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August 24, 2005

ADDENDUM

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Memorandum in Support of Emergency Motion for Relief from Mandate and, In The Alternative, To Present New Evidence, *Christophe Roche, et al. v. Lincoln Property Co., et al.*, Civil Action No. 02-1390-A (GBL) (E.D. Va. filed Aug. 5, 2004):

Ex. E (Declaration of Dan M. Jacks dated Aug. 5, 2004) 2a

Ex. F (Declaration of Jeff Franzen dated Aug. 5, 2004) 4a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 02-1390-A (GBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,
v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

[filed Aug. 5, 2004]

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR RELIEF FROM MANDATE AND, IN THE ALTERNATIVE, TO PRESENT NEW EVIDENCE

[text, signature block, and certificate of service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 02-1390-A (GBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

DECLARATION OF DAN M. JACKS

Dan M. Jacks, being duly sworn, deposes and says:

1. I am over the age of eighteen (18) and am otherwise competent to make this Declaration. The information contained in this Declaration is based on my personal knowledge.

2. I am the General Counsel and Vice President of Lincoln Property Company ("Lincoln"). Furthermore, I am the General Counsel, Vice President and Assistant Secretary for Lincoln Eastern Management Corporation, Lincoln E.C.W. Property Management, Inc., and EQR/Lincoln Limited Partnership ("EQR"). As such, I have personal knowledge concerning EQR's operations and revenues.

3. EQR was formed in 1997 and, since that date, has provided property management services (commonly referred to as "fee-management" services) for multi-family residential real estate projects owned by third-parties, such as insurance companies, person funds and real estate investors.

4. Both at the date of filing of the above-captioned lawsuit (August 22, 2002) and the date of its removal to federal court (September 17, 2002), EQR's headquarters

and principal place of business were located in Dallas, Texas.

5. On the date of filing and removal, EQR managed multi-family residential real estate projects in jurisdictions all over the country, including Texas, New Mexico, Colorado, Indiana, Pennsylvania, Ohio, Missouri, Illinois, Kansas, Minnesota, Wisconsin, Michigan, New Jersey, Massachusetts, Virginia, South Carolina and California.

6. As of the date of filing and removal, EQR fee-managed 281 projects (including 79,487 apartment units) around the country. Five (5) percent of those projects (fifteen (15) projects, including 5,500 units) were located in Virginia.

7. In 2002, EQR's revenues for fee-management services was $17,353,300. Only fourteen (14) percent of those revenues arose from fee management services that EQR provided for properties located in Virginia.

8. One of the 281 projects for which EQR provided fee-management services in 2002 was Westfield Village, a multi-family housing project located in Fairfax, Virginia owned by the State of Wisconsin Investment Board ("SWIB"), the subject of the above-captioned lawsuit. EQR is the only entity that received fees for the management of Westfield Village. No other entity affiliated with Lincoln (1) was involved in the management of Westfield Village or (2) received fees or revenue of any kind for the management of it.

I hereby declare under penalty of perjury that the foregoing information is true and correct.

8-5-04
Date

/s/ DAN M. JACKS
Dan M. Jacks

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 02-1390-A (GBL)

CHRISTOPHE ROCHE, ET AL.,
Plaintiffs,

v.

LINCOLN PROPERTY CO., ET AL.,
Defendants.

DECLARATION OF JEFF FRANZEN

Jeff Franzen, being duly sworn, deposes and says:

1. I am over the age of eighteen (18) and am otherwise competent to make this Declaration. The information contained in this Declaration is based on my personal knowledge.

2. I have been and am a limited liability partner in several partnership [*sic*] that were formed to participate in the ownership of multi-family housing projects. As of the date of filing of the above-captioned lawsuit (August 22, 2002) and the date of its removal to federal court (September 17, 2002), I was a limited liability partner in the following partnerships:

a. Lincoln Property Company No. 2092 Limited Partnership, which had an indirect ownership interest in a multi-family housing project in Haverhill, Massachusetts;

b. Lincoln Property Company No. 2144 Limited Partnership, which had an indirect ownership interest in a multi-family housing project called "Marina Bay II" in Quincy, Massachusetts;

c. Lincoln Property Company No. 2176 Limited Partnership, which had an indirect ownership interest

in a multi-family housing project called "Bethel Park" in Bethel Park, Massachusetts;

d. Lincoln Property Company No. 2348 Limited Partnership, which had an indirect ownership interest in the following multi-family housing projects:

Liberty Park Apartments in Braintree, Massachusetts

Riverpointe Apartments in Lawrence, Massachusetts

Marina Bay I in Quincy, Massachusetts

North Pier in Jersey City, New Jersey

Hudson Point in Jersey City, New Jersey

Fairfax Corner Apartments in Fairfax, Virginia

Potomac Yards in Alexandria, Virginia

Reserve at Town Center in Loudoun County, Virginia; and

e. Lincoln Property Company No. 1341 Limited Partnership, which had an indirect ownership interest in a multi-family housing project called "Windridge Apartments," Phases I and II, in Grand Prairie, Texas.

3. As described above, each of these partnerships was formed to participate indirectly in the ownership of real property. The partnership that directly owned the property acquired raw land (or, in one case, a pier) and then developed a multi-family housing project on the property which, in most cases, was subsequently sold or transferred by the partnership.

4. None of the partnerships in which I was a limited liability partner is engaged in or has ever been engaged in the property management of any multi-family housing project.

5. Westfield Village, the subject of the above-captioned lawsuit, is a multi-family housing project located in Fairfax, Virginia owned by the State of Wisconsin Investment Board ("SWIB"). None of these partnerships

was involved in any way in the ownership, operations or management of Westfield Village. None of these partnerships received any fees, revenue or income of any kind for the management of Westfield Village.

I hereby declare under penalty of perjury that the foregoing information is true and correct.

8/5/04
Date

/s/ JEFF FRANZEN
Jeff Franzen